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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ANTONELLA PESCE, DANIELA MEO,
GIOVANNI CARLUCCI, and ACHILLE DI CINTIO

Appeal 2009-015012
Application 10/687,845
Technology Center 1600

Decided: May 20, 2010

Before ERIC GRIMES, RICHARD M. LEBOVITZ, and STEPHEN
WALSH *Administrative Patent Judges*.

GRIMES, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 involving claims to a hygienic article. The Examiner has rejected the claims as obvious. We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

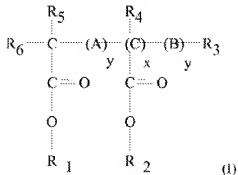
STATEMENT OF THE CASE

The Specification discloses “a composition comprising a cooling agent together with an ester derivative” (Spec. 2). The Specification discloses that the ester derivative “act[s] as a carrier for the cooling agent, to help it migrate from the composition applied on the skin and/or mucosal surface into the outer layers of the skin (stratum corneum) and bring it into direct and prolonged contact with the thermo-receptors of mammal skin and/or mucosal surface” (*id.* at 3).

Claims 10-17, 19, and 20 are on appeal. The claims have not been argued separately and therefore stand or fall together. 37 C.F.R.

§ 41.37(c)(1)(vii). Claim 10 is representative and reads as follows:

10. A hygienic article comprising a composition comprising a cooling agent together with an ester derivative of the following formula:



wherein R_1 and R_2 are independently an alkyl, alkenyl, arylalkyl, hydroxyalkyl, alkoxy groups of from about 2 to about 24 carbon atoms, hydroxy group or hydrogen group; R_3 , R_4 , R_5 , and R_6 are independently an alkyl, alkenyl, arylalkyl, hydroxyalkyl, alkoxy groups of from about 1 to about 24 carbon atoms, hydroxy group or hydrogen group; A and B are independently a C_1 - C_6 linear or branched alkylene, alkyl, alkenylene, alkoxy, hydroxyalkylene, hydroxyalkyl groups; the values of x are independently from 0 to about 15; the values of y are independently 0 or 1.

OBVIOUSNESS

Issue

The Examiner has rejected claims 10-17, 19, and 20 under 35 U.S.C. § 103(a) as being obvious in view of Williams,¹ Schneider,² and Furman.³

The Examiner finds that Williams discloses a tampon “designed to provide a sensory signal to the user.... The sensory signal can be a cold sensation produced by a cold sensation material such as menthyl lactate..., menthol, ethanol or combinations thereof” (Ans. 4). The Examiner finds that Schneider discloses “a sanitary hygiene product having odor preventing properties that contains triethyl citrate” (*id.*). The Examiner concludes that “[i]t would have been obvious to one of ordinary skill in the art ... to add an ester of citric acid, such as triethyl citrate, as suggested by Schnieder [sic], ... to the hygienic article, tampon, of Williams and produce the instant invention ... because Schneider teaches that triethyl citrate is the best suitable odor preventing agent for this application” (*id.* at 5). The Examiner finds that Furman teaches the limitations of some dependent claims (*id.* at 4).

Appellants contend that the Examiner erred in finding that one of skill in the art would have been motivated to combine the cited references to arrive at the invention of claim 10 (Appeal Br. 3).

The issue with respect to this rejection is: Does the evidence of record support the Examiner’s conclusion that the cited references would

¹ Williams, US 6,506,958 B2, Jan. 14, 2003

² Schneider et al., US 4,583,980, Apr. 22, 1986

³ Furman, US 5,451,404, Sept. 19, 1995

have made obvious the invention of claim 10 to a person of ordinary skill in the art?

Findings of Fact

1. Williams discloses a tampon with an indicator at one end that provides a sensory signal to the user that the tampon's absorbent capacity is exhausted or almost exhausted. (Williams, col. 2, ll. 21-31).

2. Williams discloses that "the sensory material 24 may ... include a material that produces a cold sensation.... Suitable materials that produce a cold sensation when contacted with menstrual fluid include, for example, menthyl lactate..., menthol, ethanol, or any combinations thereof" (*id.* at col. 4, ll. 1-9).

3. Schneider discloses "sanitary hygiene products for the absorption of secretions containing urine and/or blood which have an absorbent layer containing esters of citric acid and/or acetylcitric acid as [an] odor-preventing substance" (Schneider, col. 1, ll. 16-20).

4. Schneider discloses that the sanitary hygiene products can be "diapers, panty shields sanitary napkins, or tampons" (*id.* at col. 2, ll. 13-17).

5. Schneider discloses that "the triethyl ester of citric acid is distinguished by having the strongest odor-preventing effect as well as the best suitability for practical application" (*id.* at col. 3, ll. 2-4).

Analysis

Claim 10 is directed to a hygienic article comprising a composition comprising a cooling agent and an ester derivative (of formula I, as set forth above). Appellants do not dispute that triethyl citrate is a compound of claim 10's formula I.

Williams discloses a tampon with a sensory material at one end that produces a cold sensation when contacted with menstrual fluid so that the user will have an indication that the tampon is full. Schneider discloses the use of triethyl citrate as an odor-suppressor in tampons. In view of these disclosures, it would have been obvious to one of skill in the art to modify Williams' signal tampon to contain triethyl citrate because of its odor-suppressing property, as disclosed by Schneider. The combination is merely the predictable use of known elements for their established functions. *See KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 416 (2007) ("The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.").

Appellants contend that one of skill in the art would not have been motivated to combine the teachings of the cited references because Williams uses the sensory material to provide a burst of sensation whereas Schneider's triethyl citrate is intended for long-term odor suppression (Appeal Br. 3-4).

This argument is not persuasive. Appellants have pointed to no evidence that a skilled worker would have expected the use of triethyl citrate for long-term odor control to be incompatible with the use of a cooling agent in the same tampon to generate a sensory signal at the end of the tampon's functional period. Appellants have not adequately explained why the difference in intended length of effect would dissuade one of skill in the art from combining the two known, beneficial tampon features.

Appellants also argue that the signal of Williams' sensory material would be dampened if it was used in conjunction with Schneider's triethyl citrate (Appeal Br. 4-5) and that Williams teaches away from the claimed combination, for the same reason (*id.* at 5). However, Appellants have not

pointed to no evidence in the record or provided sound fact-based reasoning to support the assertion that adding triethyl citrate to Williams' product would reduce the sensory signal. This argument is therefore not persuasive.

Conclusion of Law

The evidence of record supports the Examiner's conclusion that the cited references would have made obvious the invention of claim 10 to a person of ordinary skill in the art.

SUMMARY

We affirm the rejection of claims 10-17, 19, and 20 under 35 U.S.C. § 103(a).

Appellants did not dispute the merits of the provisional rejection of claims 10-17 and 19 for obviousness-type double patenting (see Appeal Br. 3). Appellants have therefore waived their right to further appellate review of this rejection. 37 C.F.R. § 41.37(c)(1)(vii).

TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

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Application 10/687,845

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